

**VALUATION IN BANKRUPTCY.  
EXAMINING VALUATION METHODS, EVIDENTIARY  
REQUIREMENTS, AND OTHER CONSIDERATIONS FOR  
BOTH DEBTORS AND CREDITORS IN BANKRUPTCY.**

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# Purposes of Valuation

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- I. Determining Secured Status**
- II. Adequate Protection**
- III. Bankruptcy Sales under §363**
- IV. Plan Treatment**

# Bankruptcy Section 506

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- **Secured Claims and Unsecured Claims**
- **Filing of claims**
- **Cramdowns**
  - **Value of collateral**
  - **Plan**
- **Attorneys' Fees and Interest under §506(b)**

# Stay Relief and Adequate Protection

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- **Bankruptcy Code Sections 361 and 362**
- **Diminution in Value Post-Petition**
- **Property necessary for an effective reorganization**
- **Debtor's equity in property**
- **Timing for adequate protection requests**

# Adequate Protection- Considerations

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- **Adequate Protection**
  - **Is there equity in the collateral?**
  - **If not- Debtor offering adequate protection payment until confirmation of plan**
    - **Escrow**
    - **Principal/interest payment**
  - **If the Debtor is not offering or paying adequate protection....and**
    - **If the secured creditor can show that the property is worth less than the amount owing to it, then that creditor has proved a lack of adequate protection and should get relief from stay. Without competent evidence of value, however, a lack of adequate protection cannot be proved.**

# Motion for Adequate Protection- *Where is My Money?*

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- **What is it?**
  - **A motion filed by a Creditor to ensure their interest in the collateral is protected from loss.**
- **When is this most commonly needed in Chapter 11 cases?**
  - **Post-Petition, Pre-Confirmation Escrow Disbursements.**

# Cash Collateral and DIP Financing Considerations

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- **Bankruptcy Code Sections 363 and 364**
- **Debtor must obtain consent to use cash collateral**
- **Validity, priority, and extent of security interest**
- **Priming liens on encumbered property**

# What is Cash Collateral? Motion to Use Cash Collateral?

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- **Cash Collateral** – cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalent in which the estate and any entity other than the estate have an interest, such as a lien or a co-ownership interest.
- **Motion for Use of Cash Collateral**
  - Can be 1st Day Motion
  - If not, typically filed shortly after Motion to Employ is granted
  - Must have court permission to use assets of the estate
  - Oppose?
    - Do you have equity?
    - What is the budget in the Motion?
    - Can cash flow be initiated?



# Considerations for Plan Confirmation

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- **Bankruptcy Code § 1129**
- **Bifurcated claims**
- **Treatment of similarly situated creditors**
- **Liquidation analysis and best interest of creditor's test**
- **Determining Interest Rates**
- **Application of adequate protection payments**

# 1111(b) Election

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- What is it?
- How do you make it?
- Which creditors are most likely to benefit?
- How often utilized in practice?
- What effect does it have?

# 1111(b) Election- Definitions to Know!

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- **Secured Debt-** the lien was properly perfected pre-petition
- **Wholly Secured-** Enough equity exists in the collateral to fully pay the lien amount owed on the date of filing
- **Partially (or Under) Secured-** The market value of the collateral is less than what is owed on the lien

# 11 U.S.C. 1111(b) Election – Restrictions/Limitations

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- **Restrictions/Limitations**
  - **Very limited on how the Debtor proposes to pay over time**
  - **Elimination of creditors' unsecured deficiency claim**

# 1111(b) Election - Why Should I Care?

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- **What is the election really?**

- The election under 11 U.S.C. § 1111(b)(2) is a potential weapon for an undersecured creditor being crammed down in a plan. The creditor can elect to be “fully secured” with no bifurcation of the claim into secured and unsecured parts. Keep in mind, this comes with certain tradeoffs. The creditor is paid the total amount of its claim after it is discounted to the present value.

- **Who can file?**

- Any secured creditor may file an 1111(b) election, unless the property is of inconsequential value or to be sold under the plan or under 11 U.S.C. § 363.

- **When and how do you file?**

- Caution is warranted! The election may be filed at any time prior to conclusion of the hearing on the disclosure statement, or at “such later time as the court may fix.” It must be made in writing and signed, but can also be made at the hearing on the disclosure statement (this is not a recommended best practice). A written election should be made before the DS hearing.

- **No Take Backs! Why?**

- Courts have held that once a creditor has timely made a Section 1111(b) election, it may not withdraw that election provided that the plan under which the election was made has not been materially amended.

# 1111(b) Election – Time to Test!

What happens if the debt is only partially secured?

- The proposed Chapter 11 Plan states the lien will be crammed down, or bifurcated, into secured and unsecured portions, with separate plan treatment for both.
  - Here's an example- the market value will be \$100,000 and the lien amount on the date of filing was \$160,000.
  - Plan proposes to pay \$100,000 as secured debt and the remaining \$60,000 as a general unsecured creditor (paid at 5%, or \$3,000).



**Market Value (at confirmation):  
\$100,000**

**Lien Amount: \$160,000**

# To Elect or Not to Elect? Let's Try the Math for NOT making the election



- **Cramdown Payout**

- Plan proposes a cramdown to \$100,000.00 at 5.0% over 30 years:  $\$100,000.00 \times 5\% \text{ over } 30 \text{ years} = 360$  P&I payments of \$536.82, resulting in a *total of \$193,255.78 paid over the 30-year term.*

- Remember, the creditor retains the ability to vote as both a secured and unsecured creditor under the bifurcated claim and can block rights in one or both categories.

- **1111(b) Payout**

- 1111(b) election pays \$160,000.00 at 0.0% over 30 years: results in 360 P&I payments of \$444.45, resulting in a *total of \$160,000 paid over the 30-year term.*

# To Elect or Not to Elect? Let's Try the Math for YES, make the election



Most importantly: Creditor loses the ability to vote on the plan!

- **Prong 1: Claim = \$160,000**

- **To Satisfy: The present value of the stream of payments must be at least equal to the value of the claimant's lien.**



- **160,000.00 at 0.0% over 30 years = \$160,000.00 (360 payments of \$444.45)**

- **Prong 2: Value = \$160,000**

- **To Satisfy: The total of the payments must at least equal the total allowed claim of the claimant.**

- **Present value of \$160,000.00 at 5.0% over 30 years = \$82,791.00**



The second prong is not satisfied, therefore the plan would need to pay \$160,000.00 over 30 years at 1.30% to reach a present value of \$100,027.64 (360 payments of \$536.97), with a future value of \$193,309.20.



# 1111(b) Election –Some Helpful Tools

|                                      | No 1111(b) Election  | 1111(b) Election   |
|--------------------------------------|--|--|
| Bifurcation of Claim Section 506(a)  | Claim equal to value of collateral. Claim bifurcated into secured and unsecured portions   | Claim equal to full amount of Creditor's Claim. No Claim bifurcation.  |
| Recourse/Unsecured Claim             | Has recourse against borrower regardless of whether loan was recourse or non-recourse prior to filing.<br><br>Has an unsecured deficiency claim.                         | Loan is non-recourse.<br><br>Unsecured deficiency claim waived.  |
| Unsecured Voting Right               | Has right to vote as an unsecured creditor due to the deficiency claim.<br><br>Has ability to block confirmation as an unsecured creditor.                               | No right to vote as an unsecured creditor.<br><br>No blocking right.   |
| Unsecured Distribution               | Will receive distribution under the Plan as an unsecured creditor.   | Foregoes distribution as an unsecured creditor   |
| Confirmation Rights                  | Can raise unsecured creditor objections, such as absolute priority rule and unfair discrimination.<br><br>Can raise secured creditor objections such as feasibility etc. | Unable to raise objections in the capacity as an unsecured creditor.<br><br>Can raise objection as an secured creditor such as feasibility etc. based on modified payment structure. |
| Cramdown Treatment-Deferred Payments | Retention of lien<br>Deferred payments having present value equal to collateral value (interest)   | Retention of lien<br>Deferred payments having value to total amount of unsecured claim (no interest)   |
| Recovery From Collateral             | No right to future increases in collateral value; on sale, recovery limited to collateral value as of confirmation less principal payments received.                     | Entitled to future increases in collateral value up to total amount of allowed claim; on sale, entitled to allowed claim less payments received.                                     |

# Valuation Methods – Part 1

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- **Factors in Deciding Valuation Method**
- **Appropriate Date for Valuation**
- **Obtaining Inspections**
- **Burden of proof**

# Valuation Methods – Part 2

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## So Many Options....

- Fair Market Value
- Retail Value
- Replacement Value
- Wholesale Value
- Loan Value
- Orderly Liquidation Value
- Forced Liquidation Value

# Valuation Methods – Part 3

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- **How to obtain valuation**
- **When to obtain valuation**
- **When should the court value the assets**
  - **Why does that matter?**

# Expert Witnesses

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- **Choosing the right expert**
- **Qualifying experts**
- **Using client as expert**
- **Cost effective approaches**

# Expert Reports – Rule 26(2)(B)

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- **The report must contain:**
- **(i) a complete statement of all opinions the witness will express and the basis and reasons for them;**
- **(ii) the facts or data considered by the witness in forming them;**
- **(iii) any exhibits that will be used to summarize or support them;**
- **(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;**
- **(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and**
- **(vi) a statement of the compensation to be paid for the study and testimony in the case.**

# Evidentiary Hearings

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- **Rule 2004 discovery**
- **Obtaining Inspections**
- **Appraisals**
- **Direct and cross examination of experts**
- **War stories**

# Types of Property

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- **Real Property**
- **Personal Property**
- **Determining Lien Status**
- **Inventory v. Equipment**
- **Lease v. Loan**
- **Bank Accounts**
- **Receivables**
- **Intellectual Property**
- **Cryptocurrency**